

STATE OF MICHIGAN
COURT OF APPEALS

ROBLYNN G. SMITH,

Plaintiff-Appellee,

v

KENNETH CRISTOFORO and AMANDA
CRISTOFORO,

Defendants-Appellants.

UNPUBLISHED

March 22, 2007

No. 266942

Macomb Circuit Court

LC No. 2002-005326-CH

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiff purchased a home from defendants in 1999. She subsequently discovered structural problems with the home in 2002, and brought this action alleging claims based on fraud and negligence. Following a bench trial, the trial court awarded plaintiff damages of \$59,999, and then later entered a judgment awarding plaintiff \$67,263.81, which included interest and costs. Defendants appeal as of right. We affirm.

At trial, plaintiff presented evidence that she viewed the home three times and requested a seller's disclosure statement before signing a purchase agreement. Before making an offer, plaintiff noticed a crack in the south basement wall that had been filled. She asked defendant Kenneth Cristoforo about it, and according to plaintiff, Cristoforo told her that it had been repaired by the builder and had not caused any problems. Plaintiff explained that she decided not to have the home inspected because she was assured by defendants that there were no problems with the home and it was only seven years old. After purchasing the home, plaintiff discovered evidence of another crack on the exterior south wall of the home that extended from the basement to the roofline. It was undisputed that defendants had twice filled and painted over this exterior crack, the second time just a month or two before plaintiff first viewed the home during an open house.

A neighbor testified that he had similar cracks in his home that were caused by settling and the soil type on which the house was built.¹ The neighbor testified that he has had

¹ Amanda Cristoforo admitted that she knew the cracks were caused by settling.

continuing problems with repairing the cracks. The neighbor was aware of the crack in the exterior of defendants' home while defendants lived there, and he testified that he even discussed the problem with defendants. He specifically testified that he had suggested to defendants that they join together to approach a builder about correcting the problem. The neighbor noticed that the exterior crack in defendants' home had been repaired by the time plaintiff made an offer to purchase the house. The neighbor knew about the crack from observing it before it was filled, and could therefore detect the repair job on casual observation. However, he testified that whomever performed the repair work had done a good job of filling and concealing the crack, and stated that the crack was no longer readily visible to someone who did not know it was there.

Defendants denied that plaintiff inquired about the crack in the basement wall, and maintained that they filled the crack in the exterior wall only to prevent water from entering the home. They claimed that the repair work was noticeable, that it was obvious that the crack had been filled, and that plaintiff therefore should have discovered the defect.

Defendants argue on appeal that the trial court improperly found them liable for the cost of the structural repairs to the home.

This Court reviews a trial court's findings of fact at a bench trial under the clearly erroneous standard. *Carrier Creek Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 329-330. The trial court's conclusions of law are reviewed de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Although the trial court's original decision does not clearly identify the legal theory on which it relied to find defendants liable, the court clarified the basis for its decision when denying defendants' motion for a new trial, indicating that it had found defendants liable on a theory of fraud or intentional misrepresentation. A claim for fraud consists of the following elements:

“(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.” [*Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003), quoting *M & D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997).]

A claim based on silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). “Further, ‘there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud.’” *Id.* (citation omitted). Defendants correctly argue that fraud must be established by clear and convincing evidence, rather than by a preponderance of the evidence, and must never be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458, 459; 559 NW2d 379 (1996).

Although plaintiff based her claim on fraud, she also relied on the requirements of the Seller Disclosure Act (SDA), MCL 565.951 *et seq.* The disclosure requirements of the SDA were explained in *Bergen, supra* at 385:

Reviewing collectively the language of the relevant statutes that comprise the SDA, it is evident that the Legislature intended to allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations. Liability is precluded for errors, inaccuracies, or omissions in a seller disclosure statement that existed when the statement was delivered where the seller lacked personal knowledge, and would not have had personal knowledge by the exercise of ordinary care, of any error, inaccuracy, or omission and thus proceeds in good faith to deliver the disclosure statement to the buyer. MCL 565.955; MCL 565.956; MCL 565.960.

The parties' purchase agreement contained an "as is" clause. In its original decision, the trial court, relying on *Lorenzo v Noel*, 206 Mich App 682; 522 NW2d 724 (1994), held that the "as is" clause did not bar plaintiff's action because defendants were aware of the cracks in the home. In denying defendants' motion for a new trial, the court further explained that, based on *Lorenzo*, the "as is" clause did not preclude plaintiff's claim because defendants made fraudulent representations before plaintiff signed the purchase offer.

In *Lorenzo, supra* at 687, this Court explained that "as is" clauses allocate the risk of loss arising from conditions unknown to the parties at the time an agreement is entered. An "as is" clause will also transfer the risk of loss where a defect should reasonably have been discovered upon inspection, but was not. *Id.* However, an "as is" clause will not transfer the risk of loss to a purchaser where a seller made a fraudulent representation before the purchaser signs a binding agreement. *Id.*

Defendants maintain that plaintiff was aware of the crack in the basement, about which she had inquired, and that plaintiff should have therefore had an inspection performed prior to purchasing the home. Thus, defendants argue that the trial court erroneously determined that the "as is" clause did not bar plaintiff's claim.

Although the court questioned why plaintiff did not have an inspection performed, it found that defendants were aware of the cracks in the exterior wall, and should have disclosed them in the seller's disclosure statement. Moreover, when plaintiff inquired about the crack in the basement wall, she was assured there was no problem with the home. The court found that this representation was false because defendants were aware of the cracks in the exterior wall and had attempted to conceal them, and that defendants materially misrepresented in the seller's disclosure statement that there were no structural defects or repairs made to the house.

We disagree with defendants' argument that the "as is" clause precluded plaintiff's claim because she was aware of the crack in the basement and, therefore, should have had the property inspected or proceeded at her own risk. As this Court indicated in *Lorenzo, supra* at 687, an "as is" clause is not a defense to false representations that are made before a binding contract is entered into. The evidence indicated that defendants concealed the crack on the outside of the home, preventing plaintiff from discovering any connection between the interior basement crack

and other damage to the home, that defendants verbally represented to plaintiff that there were no problems with the home, and that defendants represented on the disclosure form that there were no structural defects or repairs made to the house. On these facts, the trial court did not err in finding that the “as is” clause did not shield defendants from liability.

We also reject defendants’ argument that there was no evidence to support the trial court’s finding that they were aware of settling or structural problems with the home while they lived there. Defendants’ neighbor testified that he had the same type of cracks in his home, which were caused by structural or settling problems, and that he had discussed the problem with defendants. The neighbor even suggested to defendants that they join together in approaching a builder about repairing the cracks, but defendants declined. The trial court reasonably inferred from this evidence that defendants were aware of a settling or structural problem with their home, and that they materially misrepresented on the seller’s disclosure statement that there were no structural problems.

Defendants further argue that plaintiff should have been aware of the exterior crack despite their failure to disclose it because their neighbor’s testimony established that the crack and repair thereof were noticeable. Defendants have mischaracterized their neighbor’s testimony. The neighbor testified that he was able to notice the exterior crack after it was repaired because he had previously been aware of the crack’s existence before the repair and concealment. He further testified, however, that defendants did a good job of covering up the crack shortly before plaintiff purchased the house, and that a person unaware of the crack’s existence therefore would not have noticed it. Contrary to defendants’ contention, the neighbor’s testimony does not establish that plaintiff should have been aware of the exterior crack before purchasing the home.

Defendants also argue that the trial court erred in awarding plaintiff damages to repair structural cracks in the entire home when there was no evidence of any cracks on the north side of the home until two years after plaintiff took possession of the house. We disagree. The trial court properly found from the trial testimony that the cracks on both sides of the home were the result of structural problems with the house as a whole. Had defendants not covered up the problem on the south exterior wall, and not misrepresented that there were no structural problems with the home, plaintiff might have decided not to go through with the purchase. Moreover, to repair the damages on the south side, the entire home had to be stabilized. Because the north side of the home was similarly affected by the structural problem, and because defendants misrepresented the existence of any structural problem with the home, the trial court did not err in awarding plaintiff damages for the cost to repair the structural defects to both the north and south walls.

Defendants also argue that the trial court’s decision included several factual errors. Although the trial court made some misstatements of fact in its original decision, it corrected those mistakes in its opinion denying defendants’ motion for a new trial. Any misstatements of fact by the court were not critical to the trial court’s decision, and we do not reverse on the basis of harmless error that was not decisive to the outcome.

For instance, defendants suggest that the trial court erroneously stated that defendants had repaired the crack in the interior basement wall. However, the court corrected this misstatement in its postjudgment opinion. Similarly, defendants also argue that the trial court erroneously

relied on photographs, taken approximately two years after plaintiff purchased the home, to determine that defendants should have been aware that the cracks were caused by a structural problem. However, any error in this regard was cured when the court explained in its postjudgment opinion that the testimony of defendants' neighbor independently established that defendants were aware of the structural problem. Reversal is not required on this basis.

Defendants further complain that the trial court failed to differentiate between the cracks in the south wall of the home when defendants sold it and the cracks that developed in the north wall of the house after plaintiff purchased it. As previously explained, however, the evidence showed that the cracks in both walls were indicative of a structural problem with the whole house, a problem defendants failed to disclose in the disclosure statement and which they concealed by filling in the crack on the exterior south wall. We find no error with respect to this matter.

Lastly, defendants reiterate that they should be relieved of liability because plaintiff was aware of the crack and repairs to the interior basement wall, and because the purchase agreement contained an "as is" clause. As explained previously, defendants informed plaintiff that there were no problems associated with the crack in the basement wall, and also failed to disclose the related exterior crack that had been concealed. Defendants then falsely represented on the disclosure statement that there were no structural problems with the house. Under the particular circumstances of this case, the trial court properly found that defendants were not relieved of liability.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra